In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 108

AARON BORIN, D/B/A WICHITA PACKING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO THE BRIEF OF WESTERN STATES MEAT PACKERS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

On June 11, 1954, the Solicitor General consented to the filing of a brief *amicus curiae* by Western States Meat Packers Association, Inc., in support of the petition for a writ of certiorari in this case. That petition was directed solely to the question whether "the defense of a state statute of limitations" may "be asserted in an action brought in the name of the United States of America for the recovery of subsidy payments made by the Reconstruction Finance Corporation" (Pet. 2). It now appears that the brief *amicus*

curiae has directed itself additionally and principally to a separate question: Whether the six-year limitation in the False Claims Act, 31 U.S.C. 235, was intended by Congress to govern claims of the Government sounding in common-law fraud. This question was briefed and argued in the Court of Appeals, and was decided adversely to the petitioner. He has not sought review of this question in this Court. In these circumstances, we respectfully suggest that the question raised by the brief *amicus curiae* is not properly before this Court and should not be considered.

Rule 23(1)(c) of this Court provides that "only the questions set forth in the petition or fairly comprised therein will be considered by the court." See also Rule 40 (d) (2), forbidding briefs on the merits from raising additional questions not already presented in the petition. Specifically recognizing that the question it propounds is not comprised in the question set forth for review by the petition (Amicus Br. 4), the *amicus curiae* has suggested that authority for its interposition may be found in Rule 42(3) of this Court which provides that a motion for leave to file a brief *amicus curiae* when any party has not consented thereto shall "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case." Even if this rule has any application where the brief is filed with the consent of the parties, it seems clear that the brief must encompass only

issues comprised in the questions as stated by the petition. It cannot include issues completely outside these questions without in effect negating the restrictions of Rule 23 (1) (c).[1]

The brief *amicus curiae* was filed on July 15, 1954, more than ninety days after the final judgment of the Court of Appeals. At that date, it would have been beyond the authority of this Court to receive a petition from the losing party below. 28 U.S.C. 2101; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399. The expiration of this time period should also preclude any fundamental change by the petitioner in the issues which he has formulated and presented in his petition. See Rules 23(1)(c) and 40(d)(2). To permit an amicus curiae at this point to accomplish what the petitioner cannot would violate the purpose of the statute and sanction an unwarranted interference in the conduct of the suit by the parties.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

JULY, 1954.

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[1] Questions regarding the jurisdiction of this Court to decide the issues presented by the parties, for example whether the case is moot, may be regarded as an exception to this principle. But properly considered, the question of the power of the Court to decide questions brought before it is inherently comprised in those questions.

The statute of limitations, as applied to private persons, is of course a defense which may be waived, and does not affect the jurisdiction of the Court.

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Petitioner,

v.

UNITED STATES OF AMERICA.

Reply Memorandum of Western States Meat Packers Association, Inc., as Amicus Curiae in Support of Petition for Writ of Certiorari.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

The Solicitor-General has filed a memorandum to contend that the question of the applicability of the 6-year limitation in the False Claims Act (31 U.S.C., Sec. 235) is not properly before the Court. But that question is *necessarily* involved in the petitioner's question whether the case is barred by a State statute of limitations.

To petitioner's question there are three possible answers: (1) "Yes", (2) "No, because no statute of limitations applies at all"; and (3) "No, because Congress has entered the field and prescribed its own period of limitations." The petitioner argues that the first is the correct answer; the Solicitor-General, the

second; and our *amicus* brief, the third, and, if not, then the first. The *amicus* brief does not present an issue alien to that raised by the petition, or, in the Solicitor-General's phrase, a "fundamental change"; while loosely referred to in the *amicus* brief as another question, it is but another answer to the same question.[1]

This Court's new Rule 23(1)(c) provides that "The statement of a question presented will be deemed to include every subsidiary question *fairly comprised therein.*" This is to be contrasted with the prescription of old Rule 38(2) that "only the questions *specifically* brought forward by the petition for writ of certiorari will be considered." Presumably, the rule was changed so as to do away with a practice of splitting hairs in a proliferation of "questions" stated, and to make clear that important questions will not be compressed into a Procrustean bed that denies full and well-rounded consideration. It would be unfortunate were this Court's new Rules, in the moment of their birth, to be given a grudging construction.

Our discussion of the False Claims Act falls within that portion of Rule 42(3) which provides for an *amicus* brief where it is believed that questions of law have not been adequately presented by the parties. Consequently, we merely note that Rule 42(3) also contemplates the use of *amicus* briefs to discuss "questions of law that have not been * * * presented by the parties" at all.[2]

The Solicitor-General's memorandum concludes with a suggestion of lack of jurisdiction to consider the issue of the False Claims Act because the *amicus* brief was filed over 90 days after the judgment below. This is answered by what we have said above.

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[1]Our amicus brief refrained from discussing other questions believed to be significant but which did not seem to be covered by the petition; e.g., *amicus* brief, p. 10, where we noted that "The petition does not present the question whether the United States is a proper plaintiff" and therefore discussed the case on the assumption that it was.

[2]Rule 42(3) states that a motion for leave to file an amicus brief shall "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties."

The adverb "adequately" appears solely in the parenthetical clause and does not limit the sentence outside the commas, which thus refers to "questions of law that have not been presented by the parties."

But it may be added that the timely filing of the petition for certiorari satisfied all jurisdictional requirements. It is settled, for example, that after denial of certiorari the Court may grant a petition for rehearing to consider entirely new questions.[3]

We sense a possible intimation in the Solicitor's memorandum that consent to our filing an *amicus* brief was given on an assumption that it would discuss the question as narrowly as does the petition. Our request was written to the Solicitor-General 9 days before the petition was served upon him, and referred to our client's interest in "the questions at issue, concerning the existence of a statute of limitations against suits brought to recover meat slaughtering subsidies paid during the period of price controls in the war period." To this, our brief confined itself.

Respectfully submitted,

MOSES LASKY
Attorney for Western States
Meat Packers Association, Inc.

BROBECK, PHLEGER & HARRISON
Of Counsel.

San Francisco, California,
July 29, 1954.

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[3]Cf. Stern & Gressman, Supreme Court Practice, (p. 330):
"Questions not presented in the original petitions are not foreclosed upon rehearing, even though the statutory period for filing a petition for certiorari may have expired in the meantime. *White v. Texas*, 309 U.S. 631, 310 U.S. 530. The Court's jurisdiction over the case is established by a timely petition for certiorari."